Supreme Court, U.S.
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82-1159

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

METROPOLITAN ATLANTA RAPID
TRANSIT AUTHORITY,

Petitioner,

v.

WILLIAM E. JONES,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May an employee maintain an action against his employer for employment discrimination on the basis of handicap under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, if his employer receives no federal financial assistance a primary purpose of which is to provide employment?

LIST OF PARTIES

The names of all parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit appear in the caption of the case in this Court.

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IN THE
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NO._____

METROPOLITAN ATLANTA RAPID
TRANSIT AUTHORITY,

Petitioner,

v.

WILLIAM E. JONES,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY (hereinafter "MARTA"), respectfully prays that a writ of certiorari issue to review the decision

of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 681 F.2d 1376 and appears in the Appendix, infra, at p. A-1. The judgment of the Court of Appeals appears in the Appendix at p. A-34. The opinion of the United States Court of Appeals for the Eleventh Circuit reversed the judgment of the United States District Court for the Northern District of Georgia, Atlanta Division and remanded the case for further proceedings. The opinion and judgment of the district court is reported at 522 F. Supp. 370 and appears in the Appendix, infra, at p. A-36.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eleventh Circuit was rendered August 6, 1982. The Metropolitan Atlanta Rapid Transit Authority (hereinafter "MARTA") filed a petition for rehearing and suggestion for rehearing en banc on August 25, 1982. By order entered October 13, 1982, the United States Court of Appeals for the Eleventh Circuit denied MARTA's petition for rehearing and suggestion for rehearing en banc. A copy of said order appears in the Appendix at p. A-32. This Petition for Writ of Certiorari was filed within ninety (90) days from October 13, 1982. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794:

> No otherwise qualified handicapped individual in the United States as defined in section 706 (7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by an Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of

1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

Section 505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794a:

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964, including the application of sections 706(f) through 706(k), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on

such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accomodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the

court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Section 601 of the Civil Rights Act of 1964, Title VI, 42 U.S.C. §2000d:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 604 of the Civil Rights Act of 1964, Title VI, 42 U.S.C. §2000d-3:

> Nothing in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer,

employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

STATEMENT OF THE CASE

The decision of the Eleventh Circuit Court of Appeals, by Judge Frank Johnson, which is in direct conflict with the decisions of four courts of appeals,[1/] presents a significant federal question for decision by this Court. Petitioner Metropolitan Atlanta Rapid Transit Authority (hereinafter "MARTA") is a public body

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1 Scanlon v. Atascadero State Hospital, 677 F.2d 1271 (9th Cir. 1982); U.S. v. Cabrini Medical Center, 639 F.2d 908 (2d Cir. 1981); Carmi v. Metropolitan St. Louis Sewer District, 620 F.2d 672 (8th Cir. 1980), cert. denied, 449 U.S. 892 (1980); Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (4th Cir. 1978), cert. denied, 442 U.S. 947 (1979).

corporate and joint instrumentality of the City of Atlanta, Georgia and several counties in the metropolitan Atlanta area. Ga. Laws 1965, pp. 2243 et seq. MARTA was created by the General Assembly of the State of Georgia in 1965 for the purpose of providing rapid transit services to the metropolitan Atlanta area. MARTA receives federal financial assistance in the form of engineering and construction grants and operating subsidies from the Urban Mass Transportation Administration ("UMTA"), an agency of the United States Department of Transportation. The primary objectives of these funds are to assist in the development of improved mass transportation facilities and equipment; to encourage the planning and establishment of area wide mass transportation systems; and to assist states and local governments and their instrumentalities in financing such

systems. Providing employment is not a primary objective of these funds, although some operating subsidies received by MARTA may be, but are not necessarily, used to pay the salaries of bus operators. MARTA receives no federal financial assistance other than funds provided through UMTA.

Respondent William E. Jones (hereinafter "Jones") had been employed by MARTA as a bus operator until March 15, 1976, when he was involved in an accident, resulting in the partial amputation of his right leg. Jones was rehired by MARTA in September 1977, as a traffic checker, a job which does not involve the operation of a bus. In August 1978, Jones requested that he be reinstated to a position as a bus operator. Jones' request was denied because he was not qualified to operate a bus.

On November 19, 1980, Jones filed suit against MARTA in the United States District Court for the Northern District of Georgia, alleging that MARTA had discriminated against him on the basis of his handicap in violation of Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794. Jones invoked the jurisdiction of the district court under 28 U.S.C. § 1331, federal question jurisdiction.

MARTA filed a motion for summary judgment or, in the alternative, for partial summary judgment on the grounds, inter alia, that Jones lacked standing to sue for employment discrimination on the basis of handicap under 29 U.S.C. §794; that no private right of action was created by 29 U.S.C. § 794 and 794a for general and punitive damages; and that Jones' claim for back pay was barred by the applicable

statute of limitation. Ga. Code Ann. §3-704, O.C.G.A. 9-3-22. The Honorable Charles A. Moye granted MARTA's motion for summary judgment on August 27, 1981, holding that Jones lacked standing to sue for employment discrimination on the basis of handicap under 29 U.S.C. §794 because providing employment was not a primary objective of the federal funds which MARTA received. The district court's order was consistent with the decisions of those courts of appeals which had addressed this issue to that date.

Jones appealed to the Court of Appeals for the Eleventh Circuit, which reversed the decision of the district court on August 6, 1982 and remanded the case for further proceedings. The Eleventh Circuit recognized that its holding was in conflict with that of other courts of appeals which had addressed the

same issue. Nevertheless, it determined that a cause of action for discrimination on the basis of handicap under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794 et seq., was not limited to persons who could demonstrate that employment was a primary objective of the federal funds received, despite the 1978 Amendments to the Rehabilitation Act which incorporated the "rights, remedies and procedures" of Title VI of the Civil Rights Act of 1964. Title VI limits actions for employment discrimination to those instances "where a primary objective of the Federal financial assistance is to provide employment." 42 U.S.C. §2000d-3. MARTA's petition for rehearing and suggestion for rehearing en banc was subsequently denied by the Eleventh Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT BELOW IS IN DIRECT CONFLICT WITH THE DECISIONS OF FOUR OTHER CIRCUIT COURTS ON THE QUESTION PRESENTED HERE.

The decision of the Court of Appeals for the Eleventh Circuit in the instant case is in direct conflict with decisions of the Second, Fourth, Eighth and Ninth Circuits on the same issue.[2/] If the decision below is allowed to stand, then a class of plaintiffs will have been created

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[2] U.S. v. Cabrini Medical Center, 639 F.2d 908 (2d Cir. 1981); Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (4th Cir. 1978), cert. denied, 442 U.S. 947 (1979); Carmi v. Metropolitan St. Louis Sewer District, 620 F.2d 672 (8th Cir. 1980), cert. denied, 449 U.S. 892 (1980); Scanlon v. Atascadero State Hospital, 677 F.2d 1271 (9th Cir. 1982).

in the Eleventh Circuit which does not exist in these other circuits.[3/]

It is clear that employment is not a primary objective of the federal financial assistance which MARTA receives. Urban Mass Transportation Act, 49 U.S.C. § 1601, § 1601a and § 1601b. (District Court Opinion, Appendix, p. A-64.) It should be equally clear that employment must be a primary objective of the federal financial assistance received by an employer if an

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3 Shortly after the Eleventh Circuit's opinion, the Court of Appeals for the Third Circuit, in LeStrange v. Consolidated Rail Corp., 687 F.2d 767 (September 1, 1982) concluded that this Court's decision in North Haven Board of Education v. Bell, _____ U.S. _____, 102 S. Ct. 1912, 72 L.Ed.2d 299 (1982), compelled a finding that Section 504 reaches employment discrimination and provides a private cause of action to redress it regardless of the intended use of the federal financial assistance. Consolidated Rail Corporation has recently petitioned for a writ of certiorari to review this decision and this petition is currently pending.

employee is to have standing to assert a claim for employment discrimination under Section 504. The Rehabilitation Act was amended in 1978 to incorporate the "rights, remedies and procedures" of Title VI of the Civil Rights Act of 1964. 29 U.S.C. § 794a. Title VI limits its remedies and rights, with respect to employment practices, to instances where "a primary objective of the Federal financial assistance is to provide employment." 42 U.S.C. § 2000d-3, Section 604 of the Civil Rights Act of 1964. By virtue of the 1978 Amendments to the Rehabilitation Act, this limitation was expressly incorporated in Section 504 and restricts actions for employment discrimination based on handicap to those programs where employment is a primary objective of the federal assistance. 29 U.S.C. § 794a.

Four courts of appeals have considered this issue and held that Section 504 actions for employment discrimination based on handicap are limited to instances where a primary objective of the assistance is to provide employment. In Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (1978), cert. denied, 442 U.S. 947 (1979), the Fourth Circuit Court of Appeals construed the incorporation of the "remedies, procedures, and rights" of Title VI into Section 504 of the Rehabilitation Act to include the limitation of Section 604 of Title VI that a primary objective of the federal assistance must be employment. Its reasoning was based on the distinction between Sections 501 and 504 made by Congress in passing the 1978 Amendments to the Rehabilitation Act. Congress incorporated the remedies, procedures and rights of Title VII of the

Civil Rights Act of 1964 into Section 501, yet incorporated the remedies, procedures and rights of Title VI into Section 504. Reasoning that such a distinction "could not have been inadvertent," the court concluded it must "apply the limitation contained in § 604 of Title VI to § 504 of the Rehabilitation Act in literal compliance with Section 120(a) of the 1978 amendments." 590 F.2d at 89. In the instant case, the Court of Appeals for the Eleventh Circuit erroneously rejected the reasoning of the Trageser decision in a footnote and expressly declined to follow it. Jones v. MARTA, 681 F.2d 1376, 1382 n. 14 (1982). The two cases are in direct conflict on the issue, thus creating a class of litigants in the Eleventh Circuit that does not exist in the Fourth Circuit.

The Trageser analysis has been adopted by three other courts of appeals.[4/] The Court of Appeals for the Eighth Circuit has also analyzed Congress' incorporation of Title VI, including the limitation of Section 604, into Section 504 of the Rehabilitation Act and reached the same conclusion as the Trageser court. Carmi v. Metropolitan St. Louis Sewer District, 620 F.2d 672, 674-75 (8th Cir. 1980), cert. denied, 449 U.S. 892 (1980). The Carmi court determined that the legislative history of Title VI indicated

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4 Scanlon v. Atascadero State Hospital, 677 F.2d 1271 (9th Cir. 1982); U.S. v. Cabrini Medical Center, 639 F.2d 908 (2d Cir. 1981); Carmi v. Metropolitan St. Louis Sewer District, 620 F.2d 672 (8th Cir. 1980), cert. denied, 449 U.S. 892 (1980). The Seventh Circuit appears to have adopted the Trageser analysis insofar as it requires a plaintiff to demonstrate that a primary objective of the federal funds is the provision of employment. Simpson v. Reynolds Metal Co., 629 F.2d 1226 (7th Cir. 1980).

clearly that Congress intended to limit private actions for employment discrimination under Title VI to those instances where a primary purpose of the federal financial assistance was the provision of employment and that this limitation was incorporated into the Rehabilitation Act by the 1978 Amendments. 620 F.2d at 674-75.

In U.S. v. Cabrini Medical Center, 639 F.2d 908 (1981), the Court of Appeals for the Second Circuit interpreted the 1978 amendments to include the limitation found in Section 604 of Title VI, after analyzing the literal language of the statute.5/ The Court of Appeals for the

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5 The Second Circuit opinion did not address the issue of the application of Section 604 of Title VI to individual plaintiffs, inasmuch as the plaintiff in this action was the United States of America for the Office of Civil Rights of the Department of Health and Human Services.

Ninth Circuit has likewise determined that an action for employment discrimination brought pursuant to Section 504 is limited to those instances where a primary objective of the federal financial assistance involved is to provide employment. Scanlon v. Atascadero State Hospital, 677 F.2d 1271 (1982).[6/]

In the case at bar, the Court of Appeals for the Eleventh Circuit recognized that its decision flew in the face of the decisions of at least three other circuits. Nevertheless, it made no attempt to distinguish or otherwise reconcile its decision with those of the other circuits, but merely disagreed with the results of those cases. This decision creates a group

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[6] Although the Scanlon decision was rendered prior to the determination of the case at bar, it is neither cited nor discussed by the Eleventh Circuit.

of plaintiffs who have standing to assert claims for employment discrimination based on handicap in the Eleventh Circuit but which can not assert the same claim in the Second, Fourth, Eighth or Ninth Circuits and disrupts, without reason, a clearly established line of cases. An employer which receives federal funds and has facilities located in different circuits will face uncertain and inconsistent results which are dependent not on the law, but on the vagaries of the jurisdiction in which suit is brought, thus encouraging parties to engage in forum shopping. Moreover, this division between the circuits creates a confused and unsettled interpretation of the rights, remedies and procedures available under the Rehabilitation Act which should be resolved by this Court.

II. WHETHER A PRIVATE RIGHT OF ACTION MAY BE IMPLIED UNDER SECTION 504 OF THE REHABILITATION ACT, AND, IF SO, WHICH PERSONS HAVE STANDING TO ASSERT A CLAIM, ARE IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THE SUPREME COURT.

MARTA argued to the district court that no private right of action for damages may be implied under Section 504. The district court did not expressly address this issue. It appeared settled at that time that a private right of action for declaratory and injunctive relief did exist under Section 504. The Eleventh Circuit certainly assumed that such an action existed. Jones v. MARTA, 681 F.2d 1376, 1377 n. 1 (1982). See also Prewitt v. United States Postal Serv., 662 F.2d 292, 302 (1981). This Court had

declined to address whether a private right of action was created by the Rehabilitation Act in Southeastern Community College v. Davis, 442 U.S. 397, 404-5 n. 5 (1979).

Several Justices have recently expressed concern whether Title VI creates a private cause of action for an alleged violation of that Act. Guardians Assoc. v. Civil Service Commission of the City of New York, No. 81-431 & 81-432. During oral argument in the Guardians Association case, Mr. Justice Powell suggested that the Court must first decide whether a private right of action was implied under Title VI in order for the suit to proceed. (Transcript of Oral Argument, November 1, 1982, at 36). The concern expressed by this Court during oral argument reveals that doubt exists whether there is an implied private cause of

action under Title VI. If Title VI does not create an implied private right of action, then there is no implied right of action under the Rehabilitation Act by virtue of the 1978 Amendments to the Rehabilitation Act. 29 U.S.C. § 794a. Whether an implied private right of action exists under Section 504 of the Rehabilitation Act is fundamental to the instant case and should be addressed by this Court. "This Court . . . should be extremely reluctant to imply a cause of action absent" specific legislative direction. Cannon v. University of Chicago, 441 U.S. 677, 718 (1979) (Rehnquist, concurring).

Assuming a private right of action exists under Section 504, it is not without bounds. "The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretations." American Fire & Casualty Co. v. Finn, 341

U.S. 6, 17 (1951). Thus, the scope of a private right of action, if it exists, is not without limits. The implied right of action must not be expanded by the judiciary beyond the intentions of Congress. This Court has not addressed the breadth of any implied private right of action under Section 504 with respect to actions for employment discrimination.[7] This is a question of obvious importance to all recipients of federal financial assistance and their employees.

Presently the courts of appeals use four conflicting tests to determine whether a plaintiff has standing to assert a claim for employment discrimination on the basis of handicap under Section 504. As

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[7] This Supreme Court has twice denied certiorari on this question, in the Trageser and Carmi decisions; however no conflict between the circuits existed at the time those petitions for certiorari were filed.

discussed above, the Second, Fourth, Eighth and Ninth Circuits have determined that a plaintiff must demonstrate that the provision of employment is a primary objective of the federal assistance received by his employer in order to have standing.[8/]

The Fifth Circuit requires merely that a plaintiff "show that the program or activity with which he or she was involved, or from which he or she was excluded, itself received or was directly benefited by federal financial assistance." Brown v. Sibley, 650 F.2d 760, 769 (1981). In Doyle v. University of Alabama in

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8 The Seventh Circuit also appears to require a plaintiff to demonstrate that the provision of employment is a primary objective of the federal assistance. Simpson v. Reynolds Metal Co., 629 F.2d 1226 (1980). Assuming a finding that employment is a primary objective, the Seventh Circuit then requires the plaintiff to prove that he was an applicant for, or participant in, the program for which federal assistance was provided.

Birmingham, 680 F.2d 1323 (1982), a case decided by the Eleventh Circuit shortly before the instant case, the court purported to follow the "nexus" test of Brown v. Sibley.

In the instant case, the Eleventh Circuit deviated from the "nexus" test and, instead established a third test, holding that a plaintiff must demonstrate only that "he was an intended beneficiary of the assistance" received by his employer. 681 F.2d at 1382.

Finally, the fourth test is, in essence, no test at all. The Third Circuit has held that all employees of an employer receiving federal financial assistance have standing to assert a claim of handicap discrimination in employment regardless of the use, or intended use, of the funds received by his employer.

LeStrange v. Consolidated Rail Corp., 687 F.2d 767 (1982).

The standing requirements for bringing claims pursuant to Section 504 is currently in a state of complete confusion and the courts of appeals are interpreting the same Federal statutes in widely different ways. Clear direction from this Court is needed, and MARTA submits that the litigants and the lower courts need the prompt assistance of this Court in resolving this important federal question.

CONCLUSION

On the basis of the foregoing, a Writ of Certiorari should be issued to review the judgment and opinion of the Eleventh Circuit and, upon review, this Court is requested to reverse that decision.

Respectfully submitted,

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Dated: January 10, 1983

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7746

WILLIAM E. JONES,

Plaintiff-Appellant,

v.

METROPOLITAN ATLANTA RAPID
TRANSIT AUTHORITY,

Defendant-Appellee.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Submitted August 6, 1982

Before: VANCE, JOHNSON and HENDERSON,
Circuit Judges.

Plaintiff William E. Jones filed suit alleging that defendant Metropolitan

Atlanta Rapid Transit Authority (MARTA) violated Section 504 of the Rehabilitation Act, 29 U.S.C.A. §794, and various federal regulations by denying him a position as bus driver because of his handicap. The district court, 522 F. Supp. 370, determined that plaintiff lacked standing and dismissed the suit. Plaintiff appeals. We reverse.

I. Facts

MARTA provides rapid transit for the metropolitan area of Atlanta. The transit authority receives federal financial assistance in the form of engineering and construction grants and operating subsidies from the United States Department of Transportation (DOT). MARTA apparently utilizes a portion of the DOT funds to subsidize wages of certain employment

positions, including traffic checkers and bus drivers.

Plaintiff worked for MARTA as a bus driver for 15 years. In March 1976 plaintiff suffered an injury that necessitated the amputation of his right leg. Plaintiff recovered from the injury and was rehired by MARTA as a traffic checker. Plaintiff, however, became dissatisfied with his position and sought reinstatement as a bus driver. Plaintiff asserted that despite his injury he was capable of performing the required functions of a bus driver. MARTA officials concluded that plaintiff's injury prevented him from performing the duties of a bus driver and denied his request for reinstatement.

After exhausting administrative remedies, plaintiff brought an action under Section 504 of the Rehabilitation Act, 29 U.S.C.A. §794, contending that MARTA

discriminated against him on the basis of his handicap.[1/] The district court dismissed his suit. The court determined that Section 504 only provided a cause of action against employers that received federal financial assistance for the primary purpose of providing employment. Although MARTA received federal financial assistance, the funding was not primarily intended to provide employment.

The district court did note that Plaintiff had standing under regulations promulgated by the DOT. 49 C.F.R. §27.31. The regulations prohibited discrimination against qualified handicapped people in programs or activities that received

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1 Plaintiff has an implied right of action under Section 504 of the Rehabilitation Act. Prewitt v. United States Postal Service, 662 F.2d 292, 302 (5th Cir. 1981). Accord, Miener v. State of Mo., 673 F.2d 969, 973 (8th Cir. 1982).

federal financial assistance of any kind, not just those receiving funds for purposes of providing employment. The district court determined, however, that the regulations exceeded the scope of Section 504 of the Rehabilitation Act and were therefore invalid. Accordingly, MARTA was not amenable to suit under either the Rehabilitation Act or the DOT regulations.

II. STATUTORY FRAMEWORK

Section 504 of the Rehabilitation Act prohibits discrimination against otherwise handicapped individuals in "any program or activity receiving Federal financial assistance . . ." 29 U.S.C.A. §794.[2/]

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[2] Section 504, 29 U.S.C.A. § 794 provides:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be

The Rehabilitation Act does not, however, specify the remedies, procedures and rights of an aggrieved party. Instead, Section 505 provides that the "remedies, procedures, and rights" of a handicapped individual injured under the Act are found in Title VI of the Civil Rights Act of 1964. 29 U.S.C.A. §794a.[3]

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denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

[3] Section 505, 29 U.S.C.A. § 794a provides:

Section 601 of the Civil Rights Act of 1964 (Title VI) contains sweeping prohibitions against race discrimination by

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(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964, including the application of sections 706(f) through 706(k), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accomodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

employers.[4/] Congress, however, placed significant restrictions upon the breadth of Section 601. Section 604 authorizes a federal department or agency to maintain an action against employers to enforce Title VI only if the employer receives federal financial assistance and "a primary purpose of the Federal financial assistance is to provide employment." 42 U.S.C.A. §2000d-3.[5/] Thus in order to bring suit under Title VI, an employer must receive federal funds for purposes of providing employment.

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4 Section 601 of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000d, provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

5 Section 604 of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000d-3 provides:

A number of circuits have concluded that Congress intended to incorporate the restrictions found in Section 604 of Title VI into the Rehabilitation Act. United States v. Cabrini Medical Center, 639 F.2d 908 (2d Cir. 1981); Carmi v. Metropolitan St. Louis Sewer District, 620 F.2d 672 (8th Cir. 1980), cert. denied, 449 U.S. 892, 101 S.Ct. 249, 66 L.Ed.2d 117 (1981); Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (4th Cir. 1978), cert. denied, 442 U.S. 947, 99 S.Ct. 2895, 61 L.Ed.2d 318 (1979). Thus, a plaintiff will not have standing to maintain a suit under Section 504 of the Rehabilitation Act unless the employer receives federal

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Nothing in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organizations except where a primary objective of the Federal financial assistance is to provide employment. (Emphasis added.)

financial assistance and the primary purpose of the assistance is to provide employment. The courts have employed a variety of rationale to justify the incorporation of Section 604 into the Rehabilitation Act. In Carmi, supra, the Eighth Circuit essentially concluded that Congress intended the Rehabilitation Act and Title VI to be read in pari materia. The Fourth Circuit in Trageser, supra, determined that Congress intended to incorporate Section 604 into the Rehabilitation Act when it amended the Act by adding Section 505.

In the absence of controlling precedent in this Circuit[6] and in order to

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[6] Standing under Section 504 of the Rehabilitation Act was considered by the Court in Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981). In Sibley, the Court determined that a plaintiff did not necessarily have standing simply because the employer received some financial

ascertain the correctness of these holdings, we must examine both the language of the relevant statutes and their legislative history.

III. SECTION 504 OF THE REHABILITATION ACT

The starting point for the interpretation of a statute is the language of the

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assistance from the federal government. Instead, the plaintiff had to establish that "the program or activity with which he or she was involved, or from which he or she was excluded, itself received or was directly benefited by federal financial assistance." Id. at 769. The opinion further stressed that the burden of establishing that the particular program/activity received federal financial assistance "should be slight." Id. at 769 n. 14. Accord, Doyle v. Univ. of Ala.-Birm., 680 F.2d 1323 (11th Cir. 1982); Simpson v. Reynolds Metals Co., Inc., 629 F.2d 1226, 1232 (7th Cir. 1980).

Although holding that the plaintiff had to be involved in a program or activity that directly benefited from federal financial assistance, the Court did not determine whether the financial assistance had to be for the purpose of providing employment. Such a determination was unnecessary to the opinion.

act itself. Perrin v. United States, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979); United States v. Anderez, 661 F.2d 404, 406 (5th Cir. 1981). Normally, a court will interpret a statute in a manner consistent with the plain meaning of the statutory language. Fitzpatrick v. Internal Revenue Service, 665 F.2d 327, 329 (11th Cir. 1982). Where, however, the language of a statute is ambiguous or leads to absurd results, a court is free to consult the legislative history and discern the true intent of Congress. American Trucking Assn., Inc. v. I.C.C., 659 F.2d 452, 459 (5th Cir. 1981); Glenn v. United States, 571 F.2d 270, 271 (5th Cir. 1978).

Section 504 of the Rehabilitation Act specifically prohibits discrimination against qualified handicapped people in "any program or activity receiving Federal

assistance . . . . 29 U.S.C.A. §794. On its face, therefore, the Section applies to programs receiving federal financial aid of any kind. Moreover, nothing in the language of the statute indicates that it was intended to reach only those programs receiving federal financial assistance for the primary purpose of providing employment.7/ Because the statute is

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7 Similarly, a plain reading of Section 604 of the Civil Rights Act of 1964 would appear to render it inapplicable to private suits under the Rehabilitation Act. Section 604 expressly applies only to federal agencies and departments. Thus a federal agency or department must establish that the employer received federal financial assistance for the purpose of employment in order to maintain an action under Title VI. Section 604 does not, on its face, apply to private individuals. Accordingly, even were Section 604 deemed applicable to suits under the Rehabilitation Act, it would seemingly apply only to suits brought by federal agencies or departments and not suits brought by private individuals. Carmi v. Metropolitan St. Louis Sewer District, supra, 620 F.2d at 678 (McMillian, J., concurring); Hart v. County of Alameda, 485 F. Supp. 66, 72 (N.D.Cal. 1979).

unambiguous and does not lead to absurd results, we would normally pretermit our analysis here. Nonetheless, for purposes of clarification and in light of authority to the contrary, United States v. Cabrini Medical Center, supra; Carmi v. Metropolitan St. Louis Sewer District, supra, we turn to the legislative history to determine whether Congress intended to restrict application of the Rehabilitation Act to those programs receiving federal financial assistance for the primary purpose of employment. See Watt v. Alaska, 451 U.S. 259, 266, 101 S.Ct. 1673, 1677, 68 L.Ed.2d 80 (1981).

Congress enacted the Rehabilitation Act in 1973. Pub.L.No. 93-112, 87 Stat. 355 (1973). Neither the House nor the Senate reports contain even a scintilla of evidence indicating that Congress intended to incorporate Section 604 of Title VI

into the Rehabilitation Act and limit the applicability of Section 504 to programs receiving federal financial assistance for the primary purpose of providing employment. The legislative history to Section 504 does not even mention Title VI of the Civil Rights Act. Instead, the reports merely reiterate that Section 504 applies to any program receiving federal financial assistance.[8/]

The Rehabilitation Act was amended in 1974. Pub.L.No. 93-516, 88 Stat. 1619

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8 For example, the House Report explained the significance of Section 504 by stating that:

> Section [504] provides that no otherwise qualified handicapped individual will be discriminated against or excluded from participation in or benefits from any program or activity receiving Federal assistance.

H.R.No. 244, 93rd Cong., 1st Sess. 35 (1973), U.S.Code Cong. & Ad.News, 1973, p. 2076. The Senate Report contained substantially identical language. S.Rep.No. 318, 93rd Cong., 1st Sess. 50, 70 (1973), U.S.Code Cong. & Ad.News 1973, 2076, 2143.

(1974). Congress noted obliquely in the legislative history to the amendments that Section 504 was "patterned" after Section 601 of Title VI. S.Rep.No. 1297, 93rd Cong., 2d Sess. (1974), reprinted in U.S. Code Cong. & Ad.News 6373, 6390. At least one circuit has relied upon this lone reference as indicia that Congress intended to incorporate wholesale the provisions of Title VI, including Section 604, into the Rehabilitation Act. Carmi v. Metropolitan St. Louis Sewer District, supra, 620 F.2d 675. We find such an interpretation reads far too much into an isolated reference in the legislative history.

The reference does not indicate an intent to incorporate the strictures of Title VI into the Rehabilitation Act. Viewed in context, the reference constitutes nothing more than acknowledgement that Section 504 was written with the same

sweeping language found in Section 601 of Title VI. In fact, the legislative history to the 1974 amendments is replete with notations indicating that Section 504 was intended to encompass programs receiving federal financial assistance of any kind, not just those programs receiving federal financial assistance for the purpose of providing employment.[9]

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9 The Senate Report made clear the broad reach of Section 504. "Section 504 was enacted to prevent discrimination against all handicapped individuals, regardless of their need for, or ability to benefit from, vocational rehabilitation services, in relation to Federal assistance in employment, housing, transportation, education, health services, or any other Federally aided program." (Emphasis added.) S.Rep.No. 1297, 93rd Cong., 2d Sess. 38 (1974), reprinted in U.S.Code Cong. & Ad.News 6373, 6388. Similarly, the Report noted that:

> The language of Section 504, in following the above-cited Acts, further envisions the implementation of a compliance program which is similar to those Acts, including

Furthermore, had Congress intended to incorporate wholesale the provisions of Title VI into the Rehabilitation Act, the legislative body would have had no reason to amend the Act in 1978 and provide that the "remedies, procedures, and rights" found in Title VI were applicable to suits

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> promulgation of regulations providing for investigation and review of recipients of Federal financial assistance, attempts to bring non-complying recipients into voluntary compliance through informal efforts such as negotiation, and the imposition of sanctions against recipients who continue to discriminate against otherwise qualified handicapped persons on the basis of handicap. Such sanctions would include, where appropriate, the termination of Federal financial assistance to the recipient or other means otherwise authorized by law. Implementation of section 504 would also include pre-grant analysis of recipients to ensure that Federal funds are not initially provided to those who discriminate against handicapped individuals. (Emphasis added.)

S.Rep.No. 1297, supra, at 40, reprinted in U.S.Code Cong. & Ad.News, supra, at 6390.

under Section 504 of the Rehabilitation Act.[10/]

Finally, we note that the Rehabilitation Act is remedial in nature. Carmi v. Metropolitan St. Louis Sewer District, supra, 620 F.2d at 677 (McMillian, J., concurring). As a general matter, courts eschew narrow interpretations of remedial statutes. Instead, remedial statutes are normally accorded broad construction in order to effectuate their purpose. Peyton

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10 In any event, the precise import of the statement in the legislative history that Section 504 was "patterned" after Section 601 of the Civil Rights Act of 1964 is at best unclear. Ambiguous and unclear legislative history may not be used to alter the ordinary meaning of statutory language. Ford Motor Credit Co. v. Cenance, 452 U.S. 155, 158 n.3, 101 S.Ct. 2239, 2241 n.3, 68 L.Ed.2d 744 (1981); Dent v. St. Louis-San Francisco Ry. Co., 406 F.2d 399, 403 (5th Cir. 1969), cert. denied, 403 U.S. 912, 91 S.Ct. 2219, 29 L.Ed.2d 689 (1971); League to Save Lake Tahoe, Inc. v. Trounday, 598 F.2d 1164, 1172 (9th Cir.), cert. denied, 444 U.S. 943, 100 S.Ct. 299, 62 L.Ed.2d 310 (1979).

v. Rowe, 391 U.S. 54, 65, 88 S.Ct. 1549, 1555, 20 L.Ed.2d 426 (1968); Ayers v. Wolfinbarger, 491 F.2d 8, 16 (5th Cir. 1974). Because the legislative history is devoid of language demonstrating that Congress intended Section 604 of Title VI to apply to suits under the Rehabilitation Act, the remedial nature of the Rehabilitation Act mandates that we reject such an interpretation.

IV. SECTION 505 OF THE REHABILITATION ACT

In 1978, Congress again amended the Rehabilitation Act and added Section 505. Pub.L.No. 95-602, 92 Stat. 2955 (1978).[11] The section provides that

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11 The language of Section 505 did not appear in the original House bill. The origin of the language was in the Senate and was added to the final bill at the joint conference. H.Con.R.No. 1780, 95th Cong., 2d Sess. (1978), reprinted in U.S.Code Cong. & Ad.News at 7404.

the "remedies, procedures, and rights" of an aggrieved party are found in Title VI of the Civil Rights Act of 1964. Significantly, Congress did not simply state that suits under Section 504 of the Rehabilitation Act were controlled by Title VI. Instead, Congress made clear that only the "remedies, procedures, and rights" of Title VI were incorporated into the Rehabilitation Act. Section 604, as a substantive restriction on standing, does not constitute a right, remedy or procedure.12/

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12 A "remedy" is the means employed to enforce a right or redress an injury. Black's Law Dictionary 1163 (rev. 5th ed. 1979). The term "rights" generally connotes "a power, privilege, faculty, or demand, inherent in one person and incident upon another." Black's Law Dictionary, supra, at 1189. Clearly, the restrictions found in Section 604 of the Civil Rights Act of 1964 constitute neither a right nor a remedy under the aforementioned definitions.

Procedures prescribe methods of "enforcing rights or obtaining redress for their invasion; machinery for carrying on

Thus, under the plain meaning of the language in Section 505, Section 604 of the Civil Rights Act was not incorporated into the Rehabilitation Act.

Any lingering doubt concerning the correct interpretation of Section 505 is dispelled by reference to the legislative history. The legislative history makes clear that Congress intended the amendments to expand the remedies of handicapped individuals. See, e.g., 124 Cong.Rec. S-30311 (daily ed., Sept. 20, 1978)

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procedural aspects of a civil or criminal action . . . . As a general rule, laws which fix duties, establish rights and responsibilities among and for persons . . . are 'substantive laws' . . . ." Black's Law Dictionary, supra, at 1083. By severely restricting the category of people that can maintain an action under the Rehabilitation Act, Section 604 of the Civil Rights Act of 1964 can only be viewed as a substantive limitation on the rights created by Section 504 of the Rehabilitation Act. As such, the restriction cannot be viewed as procedural.

(statement by Senator Stafford) ("The bill allows the rehabilitation program to grow and serve more handicapped individuals and provide these individuals with greater opportunities to maximize their potential.") (emphasis added); Id. at S-155591 (daily ed., Sept. 20, 1978) (statement by Senator Cranston); Id. at S-30303 (statements by Senator Randolph); Id. at H-13901 (daily ed., May 16, 1978) (statements by Congressman Jeffords). We find it disingenuous to suggest that we read into an amendment intended to broaden remedies under the Act a restriction on standing.13/

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13 Other evidence demonstrates that the 1978 amendments were intended to expand rather than contract the applicability of the Rehabilitation Act. As originally enacted, Section 504 did not make clear that it applied to the federal government as well as state and local governments. In fact, the Justice Department issued an opinion at the request of

More specifically, the Conference Report to the 1978 Amendments acknowledges that the Rehabilitation Act extends to any recipient of federal financial assistance. H.Con.R. No. 1780, 95th Cong., 2d Sess. (1978), reprinted in U.S.Code Cong. & Ad.News 7375, 7404 (Section 505 insures that the "remedies, procedures, and rights set forth in Title VI of the Civil Rights

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the Department of Health, Education and Welfare concluding that the Federal Government was exempt from the statute. The 1978 amendments specifically negated the Justice Department's interpretation by extending the Act to executive agencies and the United States Postal Service. Prewitt v. United States Postal Service, supra, 662 F.2d at 302. As noted by Congressman Jeffords, "[t]his amendment removes [the exemption for the federal government] and applies 504 to the Federal Government as well as State and local recipients of Federal dollars . . . . I think this is fair and appropriate and should go a long way toward developing a uniform and equitable national policy for elimination of discrimination." 124 Cong.Rec. H-13901 (daily ed., May 16, 1978).

Act of 1964 would be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance . . . ."") (emphasis added). Furthermore, the discussion of Section 505 in the Conference Report was located in a subsection titled "Attorneys' Fees and Remedies." The title of an act or subsection can be used to help interpret an ambiguous statute. Russ v. Wilkins, 624 F.2d 914, 922 (9th Cir. 1980). It is reasonable to conclude that the title of this subsection indicates that Congress was adopting the section to provide benefits and remedies for an aggrieved party. On the other hand the restrictions found in Section 604 cannot be construed as either a benefit or a remedy. The explanation of the statute and the title of the subsection therefore establish that Congress did not intend to incorporate Section 604 of

the Civil Rights Act into Section 504 of the Rehabilitation Act.

Finally, we note that four years after the adoption of the Rehabilitation Act in 1973, the Department of Health, Education and Welfare enacted regulations that attempted to implement the Act. See 45 C.F.R. Part 84. The regulations did not restrict the applicability of the Rehabilitation Act to those programs receiving federal funds for the purpose of providing employment. Instead, the regulations prohibited discrimination against qualified handicapped individuals in programs and activities receiving or benefiting from any federal financial assistance. 45 C.F.R. § 84.2(f) & (h); § 84.4.

In enacting Section 505, the Senate report specifically noted the existence of the HEW regulations. Moreover, the report

noted that Section 505 did nothing more than codify the rights, remedies and procedures found in the HEW regulations.

> It is the committee's understanding that the regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures, remedies, and rights under Section 504 conform with those promulgated under Title VI. Thus, [Section 505] codifies existing practice as a specific statutory requirement. (Emphasis added.)

S.Rep.No. 890, 95th Cong., 2d Sess. 19 (1978), U.S.Code Cong. & Ad.News, 1978, p. 7312. Thus Section 505 was intended to encompass only those remedies, procedures and rights of Title VI found in the HEW regulations. Since the HEW regulations

did not utilize or mention the restrictions found in Section 604 of Title VI, Congress obviously did not intend Section 505 to incorporate such a restriction into the Rehabilitation Act.[14]

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[14] In Trageser v. Libbie Rehab. Cntr., Inc., supra, 590 F.2d 87, the Fourth Circuit relied upon the language of Section 505 to conclude that Congress intended to incorporate the restrictions of Section 604 into the Rehabilitation Act. We note, however, that the opinion suffers from a number of deficiencies that render its analysis suspect. The Trageser court made no attempt to determine whether the restrictions found in Section 604 constituted a right, remedy, or procedure within the meaning of Section 505. Moreover, the opinion failed to examine the legislative history of Section 505. As a result, the opinion did not provide any support from the legislative history for its interpretation. In fact, as we have shown, the legislative history indicates a contrary intent. Finally, without providing any supporting authority, the Trageser court concluded that Section 604 was intended to apply to actions by private parties. As noted, however, Section 604 states on its face that it applies only to actions brought by federal departments and agencies. See note 7, supra. Accordingly, we find the reasoning of the opinion decidedly unpersuasive and decline to follow it.

V. CONCLUSION

Upon consideration of the issue, we have uncovered no evidence demonstrating that Congress intended to incorporate the limitations of Section 601 of Title VI into the Rehabilitation Act. We therefore effectuate the plain meaning of the language in Sections 504 and 505 and conclude that a plaintiff need not establish that the employer received federal financial assistance for the primary purpose of providing employment in order to have standing. Instead, a plaintiff need only show that the employer received federal financial assistance and that he/she was an intended beneficiary of the assistance. Doyle v. Univ. of Ala.-Birm., supra; Brown v. Sibley, supra. Moreover, our determination leads to the ineluctable conclusion that the DOT regulations were written in a manner consistent with the

Rehabilitation Act and were therefore valid.[15]/

We of course intimate no position on the merits of plaintiff's claim. Instead, we simply hold that the district court applied the incorrect standard in determining plaintiff's standing to maintain the suit. Accordingly, the decision of the district court is REVERSED and REMANDED for proceedings not inconsistent with this opinion.

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15 The DOT regulations prohibit discrimination against qualified handicapped individuals in any program or activity receiving or benefiting from federal financial assistance. 49 C.F.R. § 27.7. The regulations define federal financial assistance as:

> . . . any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:
> (a) Funds;
> (b) Services of Federal personnel; or

(c) Real or personal property or any interest in, or use of such property, including:

(1) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(2) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

49 C.F.R. § 27.5. Thus, the regulations are not limited to employers receiving federal aid for purposes of employment. Instead, they extend to employers receiving or benefiting from any kind of federal financial assistance.

Other federal agencies have adopted similar or identical regulations. See 45 C.F.R. Part 85 (Department of Health & Human Services); 13 C.F.R. Part 113 (Small Business Administration); 31 C.F.R. Part 51 (Department of the Treasury).

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 81-7746

WILLIAM E. JONES,

Plaintiff-Appellant,

v.

METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC (Opinion August 6, 1982, 11 Cir., 1982, _____ F.2d _____).

Before VANCE, JOHNSON and HENDERSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in

regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Johnson
United States Circuit Judge

FILED: October 13, 1982

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-7746

D.C. Docket No. C80-2005A

WILLIAM E. JONES,

Plaintiff-Appellant,

versus

METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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Before VANCE, JOHNSON and HENDERSON, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United

States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby REVERSED; and that this cause be, and the same is hereby REMANDED to said District Court in accordance with the opinion of this Court;

It is further ordered that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

August 6, 1982.

ISSUED AS MANDATE: NOV. 5, 1982.

William E. JONES, Plaintiff

v.

METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY, Defendant.

Civ. A. No. C80-2005.

United States District Court,
N. D. Georgia,
Atlanta Division.

Aug. 27, 1981.

Alexander J. Repasky, Atlanta, Ga., for plaintiff.

Paul A. Howell, Jr., Denise Caffrey, Francis Toole-MARTA, Atlanta, Ga., for defendant.

ORDER

MOYE, Chief Judge.

Plaintiff William E. Jones brought this suit against the Metropolitan Atlanta Rapid Transit Authority (MARTA) pursuant to section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The plaintiff alleges that MARTA is a recipient of federal financial assistance as contemplated by section 504 and has discriminated against him, an otherwise qualified handicapped individual as defined by 29 U.S.C. § 706(7), solely by reason of his handicap. As a result, plaintiff seeks actual and punitive damages, recovery for

mental anguish, pain and suffering, and reinstatement to his former position as a bus driver.

Defendant MARTA has moved for summary judgment or, alternatively, partial summary judgment. Defendant's motion for summary judgment rests on the argument that plaintiff lacks standing to sue under section 504; its argument for partial summary judgment seeks a ruling that recovery may not be had for general or punitive damages under section 504 as a matter of law or that recovery for those types of damages is barred by the applicable statute of limitations. The Court first considers the threshold issue of standing.

Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, on which plaintiff relies for recovery provides:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing

committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

Section 504(a)(2) of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794(a)(2), provides:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by an act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

Therefore, one must look to Title VI of the Civil Rights Act of 1964 to determine the remedies, procedures, and rights of the plaintiff.

Title VI, Section 601, 42 U.S.C. § 2000d, provides:

> No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Title VI, Section 604, 42 U.S.C. § 2000d-3, provides:

> Nothing in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organizations except where a primary objective of the Federal financial assistance is to provide employment.

The Congress, in enacting the Rehabilitation Act of 1973, generally patterned the legislation after the Civil Rights Act of 1964. Specifically, Congress patterned section 504 after Title VI of the Civil Rights Act and section 901 of the Education Amendments Act of 1972. See S.Rep.No. 93-1297, 93d Cong., 2d Sess. 39, reprinted in [1974] U.S.Code Cong. & Ad.News 6373, 6390. Since November 2, 1980, the Attorney General has coordinated the administration and enforcement of section 504 at the direction of the President since the Rehabilitation Act does not provide for the enforcement of its provisions. Exec. Order No. 12,250, 45 Fed.Reg. 72,995 (1980), reprinted in 42 U.S.C. § 2000d-1 note, at 199 (Supp.1980). Prior to the issuance of that executive order the

responsibility for administering and enforcing section 504 had rested with the Secretary of Health and Human Services. Exec. Order No. 11,914 § 5, 45 C.F.R. Part 85, app. A (1979), reprinted in 29 U.S.C. § 794 note (1976). Both executive orders, however, provided for the issuance by the various federal departments and agencies of appropriate guidelines or regulations to insure the property application of section 504 to recipients of federal financial assistance as long as those regulations were consistent with the requirements of the Secretary of Health and Human Services, and later, the Attorney General. See Exec. Order No. 11,914 § 2; Exec. Order No. 12,250 § 1-402.

The specific provisions of the Rehabilitation Act recited above are in part the result of the 1978 Amendments to

the Rehabilitation Act. The 1978 Amendments made available to those aggrieved under section 504 the remedies, rights, and procedures available under Title VI of the Civil Rights Act of 1964 and provided attorneys' fees to prevailing private litigants. See 29 U.S.C. § 794a(a)(2) and (b). The 1978 Amendments also limited the reach of section 504 by the express refusal of section 604 of Title VI of the Civil Rights Act of 1964 to authorize government enforcement actions against a recipient of federal aid unless a primary objective of the federal financial assistance is to provide employment. See 29 U.S.C. § 794a (a)(2) (reprinted supra) and 42 U.S.C. § 2000d-3 (reprinted supra). While Congress in 1978 burdened section 504 of the Rehabilitation Act with the limitations of section 604 of the Civil Rights Act, it chose not to so burden section 501

of the Rehabilitation Act. The 1978 Amendments made the remedies, procedures, and rights set forth in Title VII of the Civil Rights Act of 1974 applicable to section 501 and those remedies, procedures, and rights include no limitations as found in section 604. See 29 U.S.C. § 794a(a)(1) and 42 U.S.C. § 2000e-15.

Having outlined the statutory setting of this suit, the Court now considers defendant MARTA's motion for summary judgment. MARTA contends that since the remedies, procedures, and rights under section 504 are those remedies, procedures and rights available under Title VI of the Civil Rights Act, it follows that a complainant alleging handicapped discrimination in employment pursuant to section 504 must show that the purpose of the federal financial assistance received by the employee is to provide employment, as

required by section 604 of the Civil Rights Act, as explained above. As MARTA notes, the three United States Courts of Appeal which have considered this question have all so held. Simpson v. Reynolds Metals Co., Inc., 629 F.2d 1226 (7th Cir. 1980); Carmi v. Metropolitan St. Louis Sewer District, 620 F.2d 672 (8th Cir. 1980), cert. denied, 449 U.S. 892, 101 S.Ct. 249, 66 L.Ed.2d 117 (1980); Traeser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87, 89 (4th Cir. 1979), cert. denied, 442 U.S. 947, 99 S.Ct. 2895, 61 L.Ed.2d 318 (1979). The court in Simpson held that to maintain an action for employment discrimination under section 504, a handicapped individual must be an intended beneficiary of the federal financial assistance received by his employer or must be able to show that the discrimination

directed against him affected the beneficiaries of such aid. 629 F.2d at 1227. MARTA, in addition, refers the Court to United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966), wherein the Fifth Circuit held that section 604 of the Civil Rights Act of 1964 limits the applicability of Title VI to discrimination against the beneficiaries of the federally assisted programs and does not apply to discrimination against employees of federally assisted programs unless the employees are the intended beneficiaries of the program. Id. at 882-83.

MARTA argues, therefore, that the plaintiff herein must show that the purpose of the federal financial assistance to MARTA is to provide employment or that the alleged discrimination directed against him affects the beneficiaries of such aid. MARTA has supplemented the record with the

affidavits of Alan F. Keipper, MARTA General Manager, and Carroll O. Olson, MARTA Urban Mass Transportation Administration (UMTA) Coordinator, who have stated that MARTA is the recipient of federal financial assistance in the form of engineering and construction grants and operating subsidiaries received from the United States Department of Transportation as administered by UMTA. Olson's affidavit has attached to it all of the grant contracts received by MARTA from UMTA for operating assistance from July 1, 1976, through June 30, 1981. MARTA's argument is, of course, that these affidavits and copies of grants, along with the findings and purposes of the Urban Mass Transportation Act, 49 U.S.C. § 1601 et seq., which it recites, indicate clearly that plaintiff Jones may not recover under section 504 of the Rehabilitation Act since the

federal financial assistance MARTA receives does not have as a primary objective the provision of employment.

In response to MARTA's defense based on lack of standing to sue the plaintiff has made few arguments. Plaintiff first relies upon Poole v. South Plainfield Board of Education, 490 F.Supp. 948 (D.N.J.1980), which held that section 504 is applicable to the interscholastic athletic activities of a school system receiving federal funding even if none of the federal funds are specifically spent on interscholastic athletics. Id. at 951. While the court may have broadly defined "program or activity" as found in section 601 of the Civil Rights Act of 1964, it did nothing to eliminate section 604's limitation of section 504 to programs or activities receiving Federal financial assistance where a primary objective of the federal

financial assistance is to provide employment.

With respect to defendant's reliance on Simpson, Carmi, and Trageser, the plaintiff states his belief that they incorrectly applied section 604 of the Civil Rights Act to section 504 of the Rehabilitation Act since section 604, as written, is a prohibition against suits by departments or agencies of the government. Each case, however, explained in varying degrees of detail why it was holding that although section 604 expressly curtails the authority of federal departments and agencies it also restricts private suits. See Trageser v. Libbie Rehabilitation Center, 590 F.2d 87, 89 (4th Cir. 1978) (holding section 604 applicable to private suits without explanation); Carmi v. Metropolitan St. Louis Sewer District, 620 F.2d 672, 674-75 (8th

Cir. 1980) (holding section 604 applicable to private suits based on the legislative history of Title VI); Simpson v. Reynolds Metals Co., Inc., 629 F.2d 1226, 1235 (7th Cir. 1980) (holding that Congress did not intend to extend protection under Title VI to any person other than an intended beneficiary of federal financial assistance based on the legislative history of Title VI). The Fifth Circuit case discussed above, United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966) inferred its agreement with the above holdings when it stated that section 604 clearly excluded the application of Title VI to a farmer receiving benefits under the Agricultural Adjustment Act. 372 F.2d at 883. If the limitations of section 604 apply to a farmer despite the section's reference to agencies and departments, they also apply to plaintiff. The

Court therefore finds section 604 applicable to plaintiff Jones.

In response to the materials in the record indicating the purposes of the Urban Mass Transportation Act, 49 U.S.C. § 1601 et seq., which are applicable due to the above finding, plaintiff argues that the rules and regulations promulgated under the Act make clear that funds disbursed thereunder are for the purpose of employment of labor. In addition, plaintiff argues that the plaintiff is an intended beneficiary under the Urban Mass Transportation Act since his affidavit shows the position he now holds (checker) and the one he seeks (driver) are partially funded by federal grants for engineering, construction, and operations. The Court is unpersuaded that MARTA's use of federal funds for operations, engineering, or construction alters Congress' stated purposes

for the appropriation of public funds. The Court will not base its conclusion as to the primary purposes of Congress' appropriations of federal funds for MARTA on MARTA's use of the funds when the Congress itself has explained its purposes.

Finally, the Court considers plaintiff's reference in his supplemental brief to an Order of the Secretary of Transportation issued January 19, 1977, a certified copy of which was attached to plaintiff's brief. The order was Department of Transportation's implementation of Title VI, the Department's regulations, and the Department of Justice's regulations issued pursuant to Exec. Order No. 11,764, 39 Fed.Reg. 2,575. However, Exec. Order No. 11,764 was revoked by Exec. Order No. 12,250, 45 Fed.Reg. 72,995 (1980), and 49 C.F.R. Part 27, based upon 44 Fed.Reg. 31,468 (1979), now apparently provides the

Department of Transportation's regulations with respect to section 504 of the Rehabilitation Act. Pursuant to section 1-504 of Exec. Order No. 12,250, which allowed existing agency regulations to continue in effect upon the issuance of said executive order, 49 C.F.R. Part 27 appears to remain as the Department of Transportation's guidelines with respect to the matters discussed therein, namely discrimination on the basis of handicap in programs and activities receiving or benefitting from federal financial assistance.

The Court is puzzled by plaintiff's failure to rely upon 49 C.F.R. §§ 27.31 to 27.37 which, in section 27.31(a)(1), broadly states that no qualified handicapped applicant for employment, or an employee shall, on the basis of handicap, be subjected to discrimination in employment under <u>any program or activity that receives</u>

or benefits from federal financial assistance. That regulation, if applicable, would provide plaintiff with the standing he seeks under the facts alleged in his complaint. The Court, however, believes that 49 C.F.R § 27.31(a)(1)'s failure to include within its proscription the limitation of section 604 of the Civil Rights Act of 1964 means the Secretary of Transportation, who relied upon section 504 of the Rehabilitation Act, section 16(a) of the Urban Mass Transportation Act, 49 U.S.C. § 1612(a), and section 165(b) of the Federal Aid Highway Act of 1973, as amended, 23 U.S.C. § 142 note, as his authority for the promulgation of this regulation, exceeded his statutory authority in applying section 504 to any program or activity that receives or benefits from federal financial assistance.

The Court's attempt to locate other cases brought pursuant to section 504 of the Rehabilitation Act against a recipient of funds from the Department of Transportation in order to determine how other courts have reconciled 49 C.F.R. § 27.31 with the applicable provisions of the Rehabilitation Act and Title VI met with little success. The only case the Court could locate, Lestrange v. Consolidated Rail Corp., 501 F.Supp. 964 (M.D.Pa.1980), involved a suit by an amputee against a railroad which had received federal financial assistance from the Department of Transportation in the form of loans under the Regional Rail Reorganization Act of 1973, 45 U.S.C. §§ 701-79. The Court concluded, as did Trageser and Carmi, discussed above, that the restriction of section 604 of Title VI is applicable to a case brought pursuant to section 504 of

the Rehabilitation Act, requiring a finding as to the primary objectives of the Rail Act. 501 F.Supp. at 968-69. The court never considered 49 C.F.R. or the failure of 49 C.F.R. § 27.31 to limit its applicability to recipients of federal funds to those whose primary objective was to provide employment. This Court, apparently in a case of first impression, finds 49 C.F.R. Part 27, Subpart B (Employment Practices), to have exceeded the statutory authority vested in the Secretary of Transportation inasmuch as it is inconsistent with the Rehabilitation Act's deference to Title VI of the Civil Rights Act for its applicable remedies, procedures, and rights.

The sole question remaining for discussion with respect to defendant's motion as it relates to standing is whether providing employment is in any conceivable

way a primary purpose of the legislation under which MARTA has received its funds. MARTA's grants are products of the Urban Mass Transportation Act, 49 U.S.C. § 1601 et seq. The findings and purposes of the Act and the assistance granted pursuant thereto are included in §§ 1601, 1601a and 1601b, which read as follows:

§ 1601. Declaration of findings and purposes

(a) The Congress finds--

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the welfare and vitality of urban areas, the

satisfactory movement of people and goods within such areas, and the effectiveness of housing, urban renewal, highway, and other federally aided programs are being jeopardized by the deterioration or inadequate provision of urban transportation facilities and services, the intensification of traffic congestion, and the lack of coordinated transportation and other development planning on a comprehensive and continuing basis; and

(3) that Federal financial assistance for the development of efficient and coordinated mass transportation systems is essential to the solution of these urban problems.

(b) The purposes of this chapter are--

(1) to assist in the development of improved mass transportation facilities, equipment, techniques, and methods, with the cooperation of mass transportation companies both public and private;

(2) to encourage the planning and establishment of areawide urban mass transportation systems needed for economical and desirable urban development, with the cooperation of mass transportation companies both public and private; and

(3) to provide assistance to State and local governments and their instrumentalities in financing such systems, to be

operated by public or private mass transportation companies as determined by local needs.

§ 1601a. Additional declaration of findings and purpose

The Congress finds that the rapid urbanization and the continued dispersal of population and activities within urban areas has made the ability of all citizens to move quickly and at a reasonable cost an urgent national problem; that it is imperative, if efficient, safe, and convenient transportation compatible with soundly planned urban areas is to be achieved, to continue and expand this chapter; and that success will require a Federal commitment for the expenditure of at least $10,000,000,000 over a twelve-year period to permit confident and continuing local planning,

and greater flexibility in program administration. It is the purpose of this Act to create a partnership which permits the local community, through Federal financial assistance, to exercise the initiative necessary to satisfy its urban mass transportation requirements.

§ 1601b. Additional declaration of findings

The Congress finds that--

(1) over 70 per centum of the Nation's population lives in urban areas;

(2) transportation is the lifeblood of an urbanized society and the health and welfare of that society depends upon the provision of efficient economical and convenient transportation within and between its urban areas;

(3) for many years the mass transportation industry satisfied the transportation needs of the urban areas of the country capably and profitably;

(4) in recent years the maintenance of even minimal mass transportation service in urban areas has become so financially burdensome as to threaten the continuation of this essential public service;

(5) the termination of such service or the continued increase in its cost to the user is undesirable, and may have a particularly serious adverse effect upon the welfare of a substantial number of lower income persons;

(6) some urban areas are now engaged in developing preliminary plans for, or are actually carrying out, comprehensive projects to revitalize their mass transportation systems to continue to provide vital service.

These findings and purposes contain no stated or implied purpose to provide employment. While the federal funds MARTA receives may have an incidental effect on employment, the Court is unable to conclude that creating jobs is a primary objective of the Urban Mass Transportation Act, or that the plaintiff herein, a checker seeking to become a driver, is an intended beneficiary of the funds MARTA receives. Consequently, the Court concludes that the limitation of section 604 of the Civil Rights Act of 1964 denies

plaintiff Jones of standing to bring suit against MARTA for alleged employment discrimination on the basis of his disability. Defendant's motion for summary judgment is therefore GRANTED, and plaintiff's pending motion for trial by jury is DENIED as moot.